

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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INTEGRATED COMMUNICATIONS &
TECHNOLOGIES, INC., et al.,

Plaintiffs,

v.

HEWLETT-PACKARD FINANCIAL SERVICES
COMPANY, et al.,

Defendants.

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Civil Action No.
1:16-cv-10386-LTS

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BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

STATUS CONFERENCE

Friday, September 13, 2019
2:00 p.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

Rachel M. Lopez, CRR
Official Court Reporter
One Courthouse Way, Suite 5209
Boston, Massachusetts 02210
raeufp@gmail.com

A P P E A R A N C E S

On behalf of the Plaintiffs:

LAW OFFICE OF DIMITRY JOFFE
BY: DIMITRY JOFFE
230 Park Avenue
10th Floor
New York, New York 10169
(212) 309-8711
dimitry@joffe.law

LAW OFFICE OF JOSH MCGUIRE
BY: JOSHUA A. MCGUIRE
51 Winchester Street
Suite 205
Newton, Massachusetts 02461
(617) 461-6400
josh@joshmcguirelaw.com

On behalf of the Defendants:

GIBBONS, P.C.
BY: ANTHONY P. CALLAGHAN AND PAUL A. SASO
One Pennsylvania Plaza
37th Floor
New York, New York 10119
(212) 613-2015
acallaghan@gibbonslaw.com

CHOATE HALL & STEWART LLP
BY: MICHAEL H. BUNIS
Two International Place
100-150 International Place
Boston, Massachusetts 02110
(617) 248-4030
mbunis@choate.com

P R O C E E D I N G S

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is September 13th, the case of Integrated Communications vs. Hewlett-Packard, civil action 16-10386 will now appear before this Court.

Counsel, please identify themselves for the record.

MR. MCGUIRE: Josh McGuire, on behalf of plaintiffs.

MR. JOFFE: Good afternoon, Your Honor, Dmitry Joffe on behalf of plaintiffs.

MR. BUNIS: Your Honor, Michael Bunis on behalf of the defendants.

MR. CALLAGHAN: Your Honor, Anthony Callaghan and Paul Saso from Gibbons P.C. on behalf of defendants.

THE COURT: Okay. Good afternoon, all of you.

So there's one or two things that I want to talk to you about and a couple of things that I want to go over, a lot of pending issues. So just give me a moment. There are so many papers and I want to pull out the right one.

Maria, can you hand me that piece of paper you were ready to give me? Okay.

All right. So just first, maybe there's some

1 confusion about the way the judicial -- the purpose -- first,
2 I have this question. Mr. Joffe, do you object to them
3 making argument in support of their motion for leave to file
4 a reply?

5 MR. JOFFE: No, I don't object to making argument.

6 THE COURT: So then why would you object to them
7 filing a reply?

8 MR. JOFFE: Well, Your Honor, I think, following
9 your instructions, I put in a two and a half page --

10 THE COURT: I actually don't think you followed my
11 instructions, but you did follow my instructions in the sense
12 that if you're going to oppose it or abide by it, but I think
13 I told you don't address the merits of the motion to strike
14 or the motion to compel. Just address why they should or
15 shouldn't be allowed to file a reply. I think -- and to that
16 extent, you went, I think, beyond that, in the two and a half
17 pages, which is then not following my instructions. So in
18 that sense, I don't think you followed my instructions.

19 I'm not going to do anything, because I think you
20 didn't follow my instructions there. But since you said it,
21 and I do think words matter and I think the record should be
22 clear, in my view, is I don't think you followed that
23 instruction.

24 But my larger point is this, okay? I was at a
25 Boston Bar Association panel yesterday, where a couple of

1 judges were just talking to lawyers about practice, and so I
2 will tell you one of the things that I said. I don't know
3 that it's particularly helpful, but it comes to my mind when
4 I think about your case. One of the suggestions that I said
5 to all the lawyers there was keep your eye on the ball.
6 Okay? What do you think the ball is in this case, for your
7 clients?

8 MR. JOFFE: To win, Your Honor.

9 THE COURT: Right. To win. And what is it that
10 they would like -- how do you think they win this case?

11 MR. JOFFE: By surviving until getting to trial and
12 prevailing there.

13 THE COURT: Right. Yes. So let me give you two
14 examples about how I think you're losing sight of the ball.
15 Okay. One is, my general view, which I don't think is
16 unusual among the federal judiciary or among judges,
17 generally, is that the idea of the judicial process is that
18 the Court hears from both sides. Okay? And it makes a
19 decision. What they asked for in a motion for leave to file
20 a reply was the opportunity to submit more information and
21 argument to the Court. As a general matter, I don't really
22 understand why or the basis for a lawyer to object to another
23 lawyer providing information to the Court.

24 That's why I asked you if you would object to
25 Mr. Callaghan or Mr. Saso arguing the motion to strike.

1 Because if you're not going to object to them arguing it,
2 they can stand up and say all the same things they said in
3 the reply, except that your meter would be running, and you
4 would be charging your client while you sat here, as opposed
5 to them filing a reply. And so if you don't object to them
6 addressing it, then why would you object to a reply? Except
7 if you lost sight of the ball, which is trying to move this
8 case to the end.

9 You're not alone in having objected to someone
10 filing a reply. It's a very small group in all my years on
11 the bench, but it's not alone and I just don't get it. Okay.
12 And I understand that when someone opposes sur-replies and
13 sur-sur-replies, there's a limit to how much briefing should
14 happen. But in the ordinary course -- for example, if
15 there's a motion for summary judgment, are you going to
16 oppose them filing a reply?

17 MR. JOFFE: No, Your Honor, I wouldn't.

18 THE COURT: So --

19 MR. JOFFE: But --

20 THE COURT: Go ahead.

21 MR. JOFFE: If I may, in this case, we filed our
22 position on September 4th and Your Honor entered an order
23 scheduling this conference on that same day. They had our
24 motion and our papers for a week, you know, and then I got
25 the call on September 11th that they want to file a reply,

1 leaving me, essentially, one day to process and prepare for
2 it and so forth. And that reply, I don't think it provided
3 new information. It just --

4 THE COURT: So you would -- so if Mr. Callaghan had
5 stood up and said everything that's in the reply, would you
6 have stood up and said, Judge, I think you should strike
7 that?

8 MR. JOFFE: No.

9 THE COURT: Right. And if you did, I would deny
10 it. And you wouldn't stand here -- if you stood here and
11 said, Judge -- I doubt you would stand here and say I can't
12 process that information in the time he spoke about it. You
13 might fairly say, if he brought something up that required
14 you to look into something, he might just say, Judge, he just
15 brought that up for the first time and I need to look at
16 that, or I need to think about that, or that causes me to
17 want to look at something. And I would ask the Court, before
18 you decide, to give me a little time to look into that. I
19 could understand that.

20 But it's not like -- honestly, with all due
21 respect, Mr. Joffe, that reply -- and no disrespect intended
22 to you, Mr. Callaghan, that reply is not rocket science.
23 What that reply says is a few things about the merits of the
24 motion to compel that responds to things you said in your
25 motion to compel and in your opposition to the motion to

1 strike, which presumably, you were prepared -- had thought
2 about anyway, because you wrote the motion to compel way back
3 when and presumably thought about all of those kinds of
4 things, so it wouldn't be stunning. And some additional
5 information or argument that he wanted me to hear. It's a
6 couple of pages, it's not -- it certainly didn't take me very
7 long to process.

8 And so the reason that I'm making what seems like a
9 very big deal out of what is a very small thing is I think
10 it's symptomatic of this case. And the reason that I'm
11 bringing it up is because today is a new day. Today is the
12 beginning of the rest of your lives, as it is every day, it
13 is also the beginning of the rest of this case, and I'm done
14 with the way this case has been going. And I will be frank
15 with you, Mr. Joffe, that I do think a lot of the way this
16 case has been going; that is, the eye not on the ball, it
17 doesn't completely arise from you, but it does arise from
18 you.

19 That motion was a waste of time, the opposition.
20 Okay? There's no reason you should have opposed a reply.
21 There's generally very little reason to oppose a reply. It
22 would be fine if you told me to strike something, because it
23 was scandalous or impertinent or not admissible, or what have
24 you, but just the same reason you wouldn't stand up and
25 object to him arguing it. It's the same thing. And so --

1 and apropos of that, I'll give you an example of something
2 else that I think is a piece of that, of not keeping your eye
3 on the ball, because I actually think here, lest there be any
4 confusion, that six to nine months, which is that each of
5 those three plaintiffs who went to prison spent in the prison
6 in China; is that right?

7 MR. JOFFE: It seven months.

8 THE COURT: How many?

9 MR. JOFFE: Seven months.

10 THE COURT: Seven. Each one was seven?

11 MR. JOFFE: Yes.

12 THE COURT: Okay. So seven months. I think that's
13 a pretty big deal. And there's no dispute that they spent
14 seven months in prison. The defendants aren't disputing
15 that. The question is why, right? And your position is the
16 why is it's their client's fault, and therefore, there should
17 be damages for it. And their defense, in some form or
18 another, is likely that it happened, but not because of them,
19 that they're not legally responsible for it. But that's kind
20 of a pretty big deal that somebody went to jail and that's an
21 important thing. I take it pretty seriously. All right.
22 And so -- and I would like this case to be adjudicated in a
23 reasonable period of time.

24 It's already, albeit, late in 2016, but it's a 2016
25 case. We're in 2019 and we're still not at depositions. And

1 so let me give you another example of what I mean about not
2 having your eye on the ball.

3 There was -- give me a moment.

4 So on February 16, 2018, the defendant served,
5 among other things, interrogatory requests on some of you --
6 on you for your clients. Okay? One of those requests,
7 Interrogatory Number 10, as to Mr. Styller, and there's a
8 similar interrogatory to Mr. Cheng, that has a different
9 number, but asks for medical records, for medical history,
10 describe in detail your medical history from 1990 to the
11 present. Okay? You remember that, I'm sure. So that was on
12 February 16th, to 18.

13 On March 16, 2018. So timely, within the 30 days,
14 without even having to seek a response, that's good. You
15 responded to those two interrogatories asking for the medical
16 history. Both of those plaintiffs, I'll remind you, have --
17 one was in prison, Mr. Cheng, and the other was not. But
18 both are claiming emotional, psychological injuries, and
19 various ailments arising either directly from the
20 imprisonment, or in Mr. Stiller's case, because his employees
21 were imprisoned.

22 MR. JOFFE: Right.

23 THE COURT: So they're putting their health in
24 issue.

25 And so the objections, the response, was object

1 it's overly broad and unduly burdensome, not proportional to
2 the needs of the case, burdens outweigh the -- so forth and
3 it's not relevant. Okay? So -- really? Not relevant? So
4 what's my view of the request? The request is too much.
5 These events happened in 2012 or 2013. So to go back to
6 1990, too far. I'm not going to give you until 1990. Okay.

7 So what does a lawyer do who thinks they punch me,
8 I'm just going to punch them back? They respond like you
9 did. It may be a New York way of doing business, I have no
10 idea. I did go to law school in New York, but I never really
11 practiced law in New York. So I don't know how people
12 practice law in New York. I only know how people practice
13 law here, but you responded -- it's just the position that
14 it's not relevant is simply wrong. Their medical history is
15 relevant.

16 I'll give you an example, if your client is
17 claiming anxiety and depression, and if the evidence is that
18 in the year before the three people were imprisoned, they all
19 had anxiety and depression, and in the year after, their
20 anxiety and depression were reported exactly the same way on
21 all the medical records, and the doctors didn't see any
22 difference, then that would be relevant. So it is relevant.
23 And so to say it's not relevant is just not -- is not
24 correct.

25 But in terms of just getting to the end, keeping

1 your eye on the ball, you want to get to judgment. You know
2 it's relevant. You're an intelligent lawyer. And so what
3 you -- the way I think a sensible lawyer would respond would
4 be that's overbroad, it's unduly burdensome. It's
5 unreasonable, 1990. We're not going to give you 1990. We'll
6 give you one year back, or we'll give you three years back,
7 or we'll give you five years back, but some period of time,
8 because it is relevant. You would agree to something, you
9 would produce, you would answer the interrogatory to that
10 extent, and then you'd move on.

11 And if they think that it's -- they really want
12 1990, they can confer with you, and the two of you can reach
13 an agreement. Or if they don't, they would ask for -- they
14 can file a motion to compel. And then you would stand in
15 front of me on the motion to compel and say, Judge, we're
16 trying to keep this case moving. We responded one month
17 after the discovery and we gave them what we thought was
18 reasonable one year, two years, three years, whatever, five
19 years, whatever you thought was reasonable and they --
20 they're asking for what's unreasonable.

21 Now, what happened here was on July 1, 2019, so
22 sometime later, Mr. Cheng, in an amended supplemental
23 interrogatory response, reiterated the entire objection,
24 which is at least -- it is correct that it's too broad, but
25 it's incorrect that it's not relevant, in my view. And gave,

1 in the interrogatory response, some post-prison medical
2 information. Okay? Mr. Styller responded on the same day,
3 but gave -- and he did give some pre-imprisonment of the
4 other three people, medical history. So although he made the
5 same objection, he actually gave information inconsistent
6 with the objection. But my point in all this is I don't
7 understand why that would take 17 months.

8 In other words, the response to the interrogatory,
9 I could see a response on March 1st, that says it's overly
10 broad, it's unduly burdensome, we're not going to give you
11 back the 1990, because it's too much, but we'll give you
12 something, but I need to gather it. So here's my response,
13 we'll give you three years back and we're going to supplement
14 promptly, after I talk to my clients, and we gather the
15 information, and the like. I wouldn't think it would take
16 16 months to figure it out.

17 So in any event, I make those observations because
18 those are two things that are giving rise to my view that
19 this case is taking too long. Okay? And where I see -- not
20 all, but some of the problems come from. So let me tell you,
21 because I want to move expeditiously, rather than spend too
22 much time just complaining, forward.

23 So the motion for leave to file a reply is allowed.
24 You, Mr. Joffe, are ordered, that you may not charge your
25 client for writing the opposition to the motion for leave to

1 reply. And if you ever prevail on this case on a ground that
2 entitles you to attorney's fees, you may not seek to recover
3 fees for writing that opposition. Okay? That opposition is
4 on you. And that's number one.

5 Number two, with respect to your motion to compel,
6 okay? This is how I view this and this is just -- the
7 deadline was July 22nd, right? I haven't moved that
8 deadline. The deadlines, so we're all clear, are established
9 by the Court and they're not for you to just do whatever you
10 feel like with. They're not aspirational. And so yes, it is
11 correct, I think, that back when we were here in June,
12 that --

13 Well, what I think I made very clear was the
14 deadline was July 22nd, that I thought it was reasonably
15 likely, but I didn't actually allow it then, that they, the
16 defendants would be able to get an extension on a motion to
17 compel arising out of the 722,000 pages, because that seemed
18 like a lot to review between mid June and the July 22nd
19 deadline, but I wasn't giving it to them, that extension.
20 And that I would -- there was also the possibility that you
21 all could propose, or you -- unstated, but certainly there,
22 that you separately could ask for an extension. You could
23 all seek a later date on July 22nd for everybody, or you
24 could seek a later date, and you ultimately did ask in the
25 form of the status report, I think it was. I don't think it

1 was in a separate motion, but fair enough.

2 You asked for an extension on the July 22nd date.
3 And then you went and filed the motion. But so one of --
4 this gets to another view that I have about litigation.

5 I don't like adjectives. I think adjectives, by
6 lawyers, especially in discovery disputes, generally belie
7 problems in the caliber of the arguments. In other words,
8 I'll give you a simple example. If you write a motion and
9 you say the defendants did terrible, outrageous things, and
10 they should be sanctioned, or they should be -- you should
11 give all sorts of relief, do you know what my response -- I
12 read those kinds of papers all the time, not just from you,
13 though you do write those kind of papers, but do you know my
14 response to that is prove it. Okay?

15 All you've done is told me your opinion, with all
16 due respect, your opinion, and this is not personal to you,
17 but the opinion of a lawyer that the other side is engaging
18 in misconduct is about one of the least persuasive forms of
19 information that can be provided in a motion. Okay? And I'm
20 not going to do anything in response to that. I'm going to
21 see what the evidence is. If you show me --

22 The lawyer who comes in and says, Judge, we served
23 our discovery request on Monday, Jan 1st, on 30 days later,
24 we hadn't heard anything. We wrote an e-mail and we said
25 where's the response, it's late. Do you need a little more

1 time, but we need to get a response to discovery. We called
2 the lawyer, we left three messages, there were no responses.
3 We wrote a letter that said we'd like to engage in a meet and
4 confer. And we proposed three times and we received no
5 response. So we're now filing this motion and we ask you to
6 give a court order that they respond to our discovery
7 requests. Not a single adjective. It's just a description
8 of the facts.

9 Do you remember Dragnet? Did you ever watch that
10 TV show?

11 MR. JOFFE: No, I didn't.

12 THE COURT: All right. You can look it up on
13 YouTube. Just the facts. That's what the character in that
14 show said.

15 That motion, do you know what I'm going to do,
16 boom, that day, I'm going to issue an order to the other
17 side, saying what's going on, and schedule a hearing, because
18 I don't need them telling me. It is outrageous if that
19 happened over a substantial period of time. I want to know
20 what's going on. Maybe the lawyer is sick and he's in the
21 hospital and he's a solo practitioner and he doesn't have
22 anyone to cover his office and I'll find that out. But short
23 of something like that -- but I didn't -- the lawyer didn't
24 tell me he proved it or she proved it. So that's what I'm
25 interested in, proof. Okay? Not adjectives that people

1 engaged in misconduct.

2 So with respect to your motion to compel, there
3 are -- I'm going to do the following. First, I'm going to
4 remind you about something that you disregarded. When you
5 were here at the status -- so it is late, in my view, but I'm
6 going to deal with that, because I'll come back to that.

7 At the status conference in June, another part that
8 neither of you quoted, but I went over it very specifically
9 when I talked about the motions to compel, I said, pay
10 particular attention, or words to that effect, to Local Rule
11 37. I know you're familiar with our local rules, because
12 you're a member of this court by pro hac vice, right?

13 MR. JOFFE: Yes, Your Honor.

14 THE COURT: And you certified when you became a
15 member pro hac vice that you had reviewed and were familiar
16 with of all the rules of this court, right?

17 MR. JOFFE: Correct.

18 THE COURT: And that's true. It was a true
19 statement then, correct?

20 MR. JOFFE: Correct.

21 THE COURT: And now.

22 MR. JOFFE: Yes, Your Honor.

23 THE COURT: Right. And so that local rule says
24 when you file a discovery motion, it shall state the request,
25 it shall state the response to the request, and then it shall

1 state what you want, or why you get what you want. Okay?
2 Your motion did not do that. Okay. So that is not a
3 technical deficiency. Okay. The problem with that is I
4 can't decide the motion.

5 Then there's two ways to do it. You can do it that
6 way, and then I can read it, and I know what you're looking
7 for, and then I read the response, and then I can decide the
8 request. Or you can do it your way, okay, which is you just
9 say I want this or this or this, but you don't. And you can
10 attach all the exhibits and then you force my law clerk and I
11 to take your document and print out all those things and
12 cross reference everything. I'm not doing that. Okay.

13 That's not how the rules work and the reason the
14 rules work the way they do is because it's your job to
15 synthesize and present it to us. Just the same way it's your
16 job to go through all the summary judgment papers and decide
17 which ones are relevant to make your argument for or against
18 summary judgment. You don't get to take all of the discovery
19 materials, hand them into the court, and say, Judge, we win
20 summary judgment because we've shown a breach of contract,
21 and it's proven in these papers. And so I brought it up
22 specifically at the status conference in June, and I referred
23 to that.

24 And the reason that I brought it up specifically,
25 as I often do, is because it's an important rule, it's very

1 helpful, it leads to better results, faster results, and many
2 people forget about it. Okay. Your motion didn't comply
3 with that. So for that reason, and only that reason, I'm
4 going to deny your motion to compel.

5 However, okay, I'm going to deny it without
6 prejudice, and I'll tell you why. It's not for all the
7 invective that you put in the motion. I find that
8 unpersuasive about their disregarding all of that. I have no
9 idea -- as I sit here now, I don't know whether they
10 disregarded all their discovery obligations, as you assert,
11 or not. Because of course, many of the things that you
12 asserted, you didn't include factual citations for.

13 The reason the denial is without prejudice is
14 because this is an important case and because I don't think
15 that resolution of it, if, in fact -- a fact of which I don't
16 know -- they didn't comply with their discovery, or if, in
17 fact, there's some additional discovery that's material and
18 meaningful to which you're entitled, then the Rule 1 directs
19 that cases should generally be resolved on the merits and I
20 would prefer to decide this case and all cases on the merits.

21 So I'm going to allow you to file another motion to
22 compel. You're going to confer with them. They didn't
23 confer with you before, because they took the position,
24 aggressive, I will say, that you were -- at the end, it was
25 too late, and so they didn't have to confer with you. It's

1 untimely. And it is true that if you were, in fact, too
2 late, they're not under an obligation to necessarily confer
3 with you. It's not always the tactic people take. I grant
4 that it's an aggressive tactic, but you have -- well, I leave
5 it at that.

6 So in any event, so with respect to your motion to
7 compel, it's denied, and I'm going to memorialize this in a
8 little order, but I'm explaining more of it now so you
9 understand. It's denied without prejudice and you can renew
10 it subject to the following, which I will put in the order.

11 One, you have to confer with them. They'll confer
12 with you now, because I've allowed them -- you to file a
13 motion. Two, your limited -- the issues you're limited to
14 are what's in your letter. You don't get to go beyond -- you
15 don't get to come up with new things now. And I'm going
16 to -- probably three weeks for the meet and confer and the
17 filing of your motion.

18 They can file an opposition and I'm not now
19 allowing you to file a reply, only because it's my ordinary
20 practice not to address replies on discovery motions in
21 advance. But if you sought leave to file a reply, I would be
22 stunned if they opposed a motion for leave to reply, even if
23 I hadn't said all the things that I've said at this hearing.
24 But of course, they'd be free to do that, if they wished to.

25 So -- but I caution you, you should listen very

1 carefully, something I'm not persuaded you were doing the
2 last time you were here, okay, that I mean what I say about
3 the local rule. If you don't comply with that rule about
4 Local Rule 37, in the way -- the form that the discovery
5 motions are supposed to be, I will deny your motion, and that
6 denial will not be without prejudice. Okay. You have one
7 more chance, but you do it following the rules or you're
8 done.

9 Are you clear?

10 MR. JOFFE: Yes, Your Honor. Thank you.

11 THE COURT: Now, you might be wondering, because I
12 know that you're a New York lawyer, that, well, Judge, their
13 motion didn't fully follow that format. So why are you
14 picking on me in this way and why aren't you going to do the
15 same to them and are you going to do the same to them? I
16 don't know if you're going to make that argument if you've
17 thought of that or not, but I'm going to address it, because
18 in this case, as in every other case, I try to be even-handed
19 in my application of the rules. They, in their discovery
20 motion, included each request. Sometimes they did, which is
21 sensible and reasonable, they said here's a request to
22 Mr. Styller, and there's other requests that are the same
23 language to different people. There is no reason to include
24 all the other requests, because they're the same. And so it
25 would be a waste of your time, my time, and paper to include

1 all ten. They reference them.

2 They don't include a block quote of your response
3 and I noticed that and I thought about that. And the reason
4 that I'm not denying their motion without prejudice, like
5 yours, for not complying with the local rule, is because
6 they're -- after they quoted their request, they -- and block
7 quote the request, they quoted your response. Okay. And
8 (a), their quotations of your responses, I found, fair, in
9 that I didn't just, to be frank with you -- and you -- I
10 didn't accept their quotations as, oh, that's all I need to
11 know. I actually went and read all of your responses that
12 they cited to be sure that their responses -- that what they
13 quoted was a fair representation of your response and didn't
14 omit something that materially changed what your response to
15 the interrogatory or the document request was. And I found
16 it fair, and they described it, so I thought it was
17 sufficient, and it would be a waste of all of your client's
18 money for me then to stand on a literal point for no purpose
19 to deny it without prejudice.

20 It's a better form, I will tell you, all of you, if
21 you quote the whole thing. I find it a little easier,
22 because it saves the trouble of verifying it that way, which
23 I will do otherwise. But in terms of it's sufficient and
24 substantial compliance with that outline of the rule, that
25 I'm able to decide it and that there's no reason to do

1 otherwise. So that's why those -- theirs is not perfect in
2 following the rule, it was sufficiently close that it seemed
3 sufficient to me and that I'll address it.

4 So that takes care of the motion to strike. That
5 takes care of your motion to compel. That takes care of --
6 there's a motion to seal, number 216, I'm going to allow
7 that.

8 And that brings us to two, three remaining issues.
9 One is the defendants' motion to compel the outstanding
10 issues about the 775,000 pages of documents, and then where
11 we're going from here. So let me tell you about the
12 775,000 pages first, because I've been thinking a lot about
13 that. So I'll tell you what I'm -- my tentative thought is,
14 and you can then both respond to that.

15 The view I expressed in June, I stand by, which is
16 that merely dumping 775,000 pages, including the junk e-mail
17 boxes, is not sufficient to comply with your disclosure
18 obligations. I suggested, strongly, I think, that all of you
19 try to see if you can figure something out, short of the
20 defendants having an army of associates sit in the room for
21 millions of dollars, potentially, or hundred of thousands of
22 dollars to review every document. There has to be a better
23 way.

24 The two of you didn't reach an agreement as to a
25 method and what you did -- what I understand you to have

1 done, for the defendants -- I'm sorry, for the plaintiffs, is
2 had your e-discovery vendor produce a spreadsheet of each
3 document, that's 225,000 line items about, because there's
4 225,000. These are all e-mails; is that right?

5 MR. JOFFE: E-mails and attachments.

6 THE COURT: E-mails and attachments.

7 MR. JOFFE: So there were a lot of standalone
8 documents, as well.

9 THE COURT: So the line item for each document.
10 The line item has essentially the name, sender, recipient
11 date, if there's a subject line, subject or title to the
12 document, something like that. And then what I understand to
13 have happened is you, Mr. Joffe, or you and Mr. McGuire, went
14 through all of the -- went through each line of the
15 spreadsheet. Based on what was in the spreadsheet, you
16 augmented in some number of instances, an unknown to me
17 number of instances, augmented by looking at the actual
18 document or documents. You then coded the document -- the
19 line as either responsive or nonresponsive.

20 And then you handed it back to the -- you did two
21 things. You gave it to the -- the spreadsheet to the
22 defendants and you gave it to your e-discovery vendor and
23 said produce the ones marked responsive. They did. That's
24 58,000 pages, I think, or documents.

25 MR. JOFFE: Documents. 56,000.

1 THE COURT: 56,000 documents.

2 MR. JOFFE: I think. 54, 56.

3 THE COURT: Thereabouts. Okay. So I'm not -- the
4 defendants object to that as a process, and as I sit here
5 now, I'm not persuaded that that process is sufficient to
6 discharge your discovery obligations. All right? So that
7 said, I'm not -- I'm still not prepared to order that you pay
8 for them to engage in a TAR process, or pay for them to
9 review everything, because I'm mindful that that's a very
10 expensive process and because that doesn't seem like the most
11 sensible way to do a disclosure and it doesn't seem to be, to
12 me, this, to be that complicated. Okay? I've never
13 encountered this kind of problem, this issue before, in this
14 way. So I tell you what my tentative plan was and you can
15 respond to it.

16 There is a consulting firm called Driven-Inc.com.
17 How do I know about this consulting firm? Because they
18 presented at a Federal Judicial Center conference on
19 technology and artificial intelligence that I attended for
20 federal judges in May. And the woman from that, the director
21 of consulting there, a woman named Tara Emory, who's CV I
22 have here, I have one copy that you can look at in a minute,
23 presented there about TAR methods and generally electronic
24 disclosure information.

25 I called her today and spoke with her and explained

1 to her essentially that this case, in part, arose out of
2 three people who were in prison, that there was a claim that,
3 essentially, HP was responsible, that was about the sum and
4 substance of what I explained about the case. I said that
5 there were these disclosures, 775,000 pages were disclosed in
6 June. The discovery deadline was in April. That it included
7 a lot of things that everyone agreed were not responsive
8 documents, like some junk e-mails. That I told the parties
9 to see if they could work out a process, that they didn't
10 come to a joint agreement about working out a process, that
11 you did this spreadsheet, as I've just described it to you
12 today, that -- and did what just what I've described.

13 That the defendants say that that's an insufficient
14 process and point out various things they view problems with
15 that process, that you had pointed out ways in which you
16 think that it's a sufficient process. And that I asked her
17 if I were willing to appoint her to supervise a disclosure
18 and then I expressed to her, without inquiring from her my
19 own view, which I'll explain to you now, which is there has
20 to be a way to do these searches to not produce all sorts of
21 junk documents.

22 And that the spreadsheet, I'm not persuaded the
23 process that you've done, although I commend you for doing
24 it. It's an effort and I commend that. That there has to be
25 a better way to do it and that something she could do, where

1 she sit ins a room, meets as sort of an appointed special
2 master, not to do the discovery, but simply to meet with and
3 supervise a meetings a series of meetings and the process of
4 some combination of on the plaintiffs' side, plaintiffs'
5 lawyers and their E-discovery vendor, or just their vendor,
6 up to you, and the defendants' side lawyers and a technical
7 person, or whatever you wish, to figure out what kind of
8 searchs could be done to produce the responsive documents
9 that are reasonable that aren't then too many.

10 She says that's something they've done that she
11 could do. I said what's the rate you usually charge, she
12 said \$295 an hour and that was the sum and substance of my
13 conversation with her. I'm disclosing it to all of you,
14 because what I'm contemplating is a solution to this problem
15 is not the spreadsheet good enough and not ordering hundreds
16 of -- ordering them -- shifting the cost. So it seems to me
17 that the most practical solution is to have somebody look it
18 over who -- I heard her present. She seemed very sensible.
19 She's experienced.

20 Ms. Simeone, you can show them -- you can give them
21 this document to look at. She e-mailed it to me, you can
22 pull it off the web, too, I'm sorry. It's her CV and her
23 marketing bio, in summary form. She went to -- she has both
24 a JD from Duke in 2003 and an LMN from Duke in 2003. She was
25 an associate at Skadden for six years, she was an associate

1 at Cadwalader, Clifford Chance. And then she's been at this
2 consulting firm since 2013. It seems like she has a lot of
3 experience in the area. Does it have to be this person? No.
4 But this was a person that I met, knew of, was impressed
5 with, seemed reasonable, and it seems like sensible to have
6 an impartial or reasonable person to meet with all of you. I
7 don't think it will be a lengthy or expensive process and
8 figure out if there isn't some way to bridge the gap. So
9 that's my thought here if you want to take a look at it now.
10 You can take those. I don't care.

11 THE DEPUTY CLERK: One copy?

12 THE COURT: It's just one of her CV and her
13 marketing bio. Those are two separate things. Both of you
14 can look at them. Comments as to that?

15 One other thing I should disclose to you. I told
16 her one more thing that I forgot. I also told her that
17 somewhere along the way, between the beginning of the
18 relevant events in this case and now, the plaintiffs went
19 through some sort of change in computer system or e-mail
20 provider or something like that, and the plaintiffs'
21 position -- there were certain things that the plaintiffs say
22 they don't have, because they weren't like -- I think what I
23 told her was I thought what it was, but I wasn't positive is,
24 they were employees of the company who then left the company,
25 for whatever reason, and so, therefore, their e-mails weren't

1 imported over to the new system and you weren't sure that you
2 necessarily had all of those e-mails anymore. And so there
3 was an issue about whether there was some -- some things one
4 ordinarily might think would exist that don't exist and the
5 plaintiffs' explanation was that's just what happened,
6 because in the shift along the way, we didn't keep them. And
7 the plaintiffs -- the defendants wanted some discovery into
8 that and that was potentially a second sort of discovery
9 issue. So I did -- that's the only other thing that I told
10 her, just in the interest of full disclosure.

11 Okay. So thoughts about whether I should do that
12 or not, or whether you think I should do something else about
13 this issue, or nothing at all, or anything else related to
14 the 775,000 pages. And in fairness, because I'm giving this
15 to you, I'm happy to hear your thoughts now, but if you want
16 to have a little bit of time to reflect on it, I'm also
17 prepared to give either or both of you that opportunity.

18 MR. JOFFE: Well, Your Honor, I'm grateful for your
19 suggestions. I just want to comment on this review that I've
20 done. And I think defendants will, I believe, reviewed or at
21 least checked the 56,000 documents that we produced as the
22 result. Those documents eliminated all the spam and all the
23 irrelevant materials for sure, because it's not just, you
24 know, the subject line review.

25 For example, like I could have reviewed everything

1 that's coming from Alibaba, or other sources of that nature.
2 And if it's something of a continuous, you know, stream of
3 spam or not necessarily spam, but professional type of
4 e-mails, that they were not related to the issues at all,
5 they could have been easily eliminated. All the spam e-mails
6 that the defendants complained about, I've eliminated all of
7 that. So the collection of -- substantial collection still,
8 but the substantial collection of 56 that we've extricated
9 from the larger 220, I think, 7,000 documents, are clearly
10 responsive, or at least related closely to the case. So
11 what's left in the remaining part is all the spam e-mail
12 that's been eliminated and there were also e-mails --

13 THE COURT: Are you prepared to submit an affidavit
14 that that's all that is left and the rest is spam?

15 MR. JOFFE: No, I'm prepared to say that there is
16 no spam in the documents that we produced.

17 THE COURT: Yes.

18 MR. JOFFE: So that collection of 56,000 documents
19 is responsive. And I was reading the TAR proposal that
20 defendants were proposing in their reports and they were
21 saying that TAR, itself, doesn't eliminate everything --

22 THE COURT: Nothing's perfect.

23 MR. JOFFE: Right. It floats the most relevant on
24 top, and then it leaves the bulk below, where the probability
25 of finding something relevant is low.

1 THE COURT: So what you would like to do is say --

2 MR. JOFFE: So I did the human TAR. I was the TAR
3 machine who was essentially doing this. I -- the 56 on top
4 are the very relevant --

5 THE COURT: How many of the documents did you
6 actually read?

7 MR. JOFFE: I don't -- hundreds. Hundreds, because
8 sometimes they appeared -- it's not spam. I wouldn't read
9 Coke versus Pepsi. And I wouldn't read thousands that come
10 from Alibaba, or any other -- the company that trades in
11 computer stuff. They have a lot of e-mails that come from
12 automated things like that, but if there was something that
13 could potentially be relevant, though, you know, between --

14 THE COURT: It would be fair to say the number of
15 documents you read was more than 100 and less than 1,000?

16 MR. JOFFE: It was more than 100.

17 THE COURT: And less than 1,000?

18 MR. JOFFE: That's hard to say, Your Honor. I
19 can't say.

20 THE COURT: Well, the only reason that I'm asking
21 is you said hundreds. So ordinarily, I would think of
22 hundreds as more than 100, but less than 1,000.

23 MR. JOFFE: I would say in the ballpark of 1,000
24 for sure. Up to 10,000.

25 THE COURT: More or less 10,000?

1 MR. JOFFE: Probably not more than 10 -- not
2 10,000, no. I mean, a quarter million of log entries was
3 burdensome enough to go through. But in the case -- but in
4 the case of *Dowd*, if the document could have been -- because
5 of the recipient --

6 THE COURT: So what happened is you went through
7 the spreadsheet, you went through each line item of the
8 spreadsheet and you read hundreds of documents, could have
9 been over 1,000, and when you thought that there was a reason
10 to look at the document to try to figure out --

11 MR. JOFFE: Yes, Your Honor. I did several stages.
12 I first eliminated all the kind of low-hanging fruit. So I
13 would run the searches or the sorting by sender, and I would
14 eliminate hundreds of e-mails from Alibaba, hundreds of
15 e-mails from eBay, hundreds of emails from generic stuff. I
16 would eliminate -- that you will see it, the e-mail is coming
17 from a schoolteacher, you know, somehow they got in. So I
18 will do that. And then at the end, what is left, is
19 essentially internal -- the company internal e-mails and, for
20 example, if it's during the relevant period, or with any of
21 the Chinese members, there would be --

22 THE COURT: So it would be fair to say that's the
23 process that you went through and you feel like that's
24 sufficient and, therefore, you don't think it's necessary to
25 appoint this or some other person to do what I described?

1 MR. JOFFE: I believe it would not be necessary,
2 particularly because the remaining stuff, defendants -- they
3 have it. I didn't keep it away from them. They have it.

4 THE COURT: Yes, I understand.

5 MR. JOFFE: And they have people, probably, among
6 themselves, who are very good at -- they sell electronic
7 discovery solutions. Defendants, themselves. So having that
8 remaining low hanging -- not low hanging, low probability
9 bunch, which they have, we're not hiding it. And just, you
10 know, we spent really enough time going over that.

11 THE COURT: Okay.

12 MR. JOFFE: I personally did. And I will put an
13 affidavit to that effect, if necessary.

14 THE COURT: I don't have any doubt that you did it
15 personally and I don't think they dispute that.

16 MR. JOFFE: Thank you, Your Honor.

17 MR. SASO: Your Honor, we don't agree with the
18 plaintiffs that enough has been done to ameliorate the data
19 dump. We are open to the Court's proposal of a special
20 master. We obviously proposed what we thought --

21 THE COURT: Remind me -- your proposal is that you
22 engage somebody to do a TAR review and they pay for it.

23 MR. SASO: That was the last proposal that we made
24 to the Court. We believe that the e-mail subject line
25 review that the plaintiffs' counsel has engaged in --

1 THE COURT: And that would cost how much to do what
2 you propose, about?

3 MR. SASO: It is -- as we had said in our last
4 joint report on that, that we could get a further estimate.
5 We believe it would be significantly lower than our first
6 estimate, which was between I think 100 and \$150,000. I
7 think that this would be much lower because now -- we would
8 only want to review the 76 percent that has been marked as
9 nonresponsive. We are putting aside -- we would not do a TAR
10 review for the 56,000 documents that they have marked as
11 responsive. So it would be a smaller subset to begin with.

12 And on top of that, we now also believe that that
13 76 percent, the percentage of spam and junk e-mails would be
14 much higher, because they've already screened out the stuff
15 that they think is responsive. So we think it would be
16 actually much more quick and much more cost efficient to use
17 TAR to be able to go through that smaller subset, but I don't
18 have, today, a number. I could look into that for Your
19 Honor.

20 THE COURT: So -- all right. I'll tell you what to
21 do about this. I'm not persuaded at the moment that the
22 spreadsheet is sufficient, for a number of reasons. One, as
23 a general matter, I don't think you're entitled to dump
24 775,000 pages, including what you know includes literal junk,
25 as in junk e-mails, on the other side, and just say "here."

1 I just don't think that's proper under the rules. And the
2 fact that they, the defendants, wanted all these search terms
3 and all I really know about that is they wanted these search
4 terms and you told them -- the plaintiff told them it was
5 producing a lot of documents. But that seems to me that, in
6 the ordinary course, that could be easily handled by figuring
7 how the searches are done and tweaking them, refining them as
8 you're doing them, so that you don't produce all this junk
9 and so that it's more clear, it's responsive, and tied to
10 things, and then we don't waste all this time litigating over
11 it.

12 In my thought of having this independent special
13 master is simply not for them to do a TAR review and not for
14 them to redo it, but for them to sit down and meet with them
15 to figure out maybe there's different extraction searches to
16 be done by your -- you, Mr. Joffe, and your plaintiffs'
17 e-discovery vendor, or -- that then produce a reasonable
18 production, and then we're done. And her rate is not, it
19 seems, strikes me is relatively reasonable. And I wouldn't
20 imagine that it would take that much time, it's just some
21 meetings and back and forth. So that's one option that I'm
22 thinking about.

23 I'm prepared to consider what you're proposing, but
24 it depends how much it costs and how long it would take. So
25 how long -- what's a period of time to talk to them, to

1 figure out, given what your more marrow purpose of what you
2 want, to find out what, roughly, what they think it would
3 cost, and how long it would take them to do it?

4 MR. SASO: Your Honor, I would expect that we would
5 be able to get an estimate from that vendor by the middle of
6 next week.

7 THE COURT: Fine. So why don't we say by a week
8 from today, you file a status report that simply says this --
9 describes what it is you propose them doing and how much they
10 estimate it would cost and how long they say it would take to
11 do, which would be -- I don't need every little detail about
12 what they do, but it should be sufficiently detailed about
13 what they do, so we can all figure out what it is and then
14 what it would cost. And then I'll think about it.

15 I'm not saying I'm going to do that, I'm not saying
16 I'm going to do what I proposed, but I'll think about what
17 further -- I don't want further briefing on the issue. I
18 think I might invite either a telephone status conference or
19 a status report, just to talk through the issue a little bit,
20 once it's sort of -- those options, there's -- the "do
21 nothing," which I'm less inclined to do, or these two other
22 options, to see where we are. So that's, for the moment, all
23 I'm prepared to do on plaintiffs' production, because that
24 will lead to -- unless there's something else about it that
25 someone thinks we need to address.

1 MR. JOFFE: Well, Your Honor, just one comment on
2 this. The -- part of the production that was designated not
3 responsive, that contains mostly that spam and the
4 presumption -- I think it was defendants' presumption that it
5 still has a lot of responsive documents and they gave several
6 examples and in our response we show that we actually
7 produced those e-mails that they said were nonresponsive,
8 versions, variations, chains of those emails were produced in
9 the 56,000 collection. So that shows that our selection of
10 responsive documents was actually fairly accurate.

11 THE COURT: Here's the problem --

12 MR. JOFFE: And there are a few that might be left
13 in the big pile of what we call -- but they have it, and
14 there would --- there ought to be some proportional --

15 THE COURT: The problem that I have is this,
16 Mr. Joffe. The fact that there is one or several relevant
17 responsive documents in the pool of the ones you identified
18 as nonresponsive doesn't persuade me that I should require
19 you or them -- you to do more. The problem I have is, (a),
20 one, the production came way late. That's a smaller problem,
21 in terms of this, but it's an issue.

22 Two, it came -- the 775,000 pages was not a proper
23 production. You cannot just hand over all that, including
24 the junk and spam e-mail, and just say "there." And then
25 only do something about it when I -- when they complain and

1 I'm -- and I'm complaining, which is what happened in June.
2 And so now you did something.

3 MR. JOFFE: We did.

4 THE COURT: You did. I absolutely say you did
5 something. And it is better than it was in June, for sure.
6 They would agree with that, as well. And the question is, is
7 it enough. Okay? And so on the way you've described what
8 you've done, which is what I have, I'm not fully persuaded
9 that that is the way that is the proper way or a sufficient
10 way to do the discovery. That's what gives me pause. The
11 fact that there are a couple of documents, fine, there's a
12 couple of documents, there's going to -- when you're
13 producing, doing an electronic production, if they did a TAR
14 review, you could probably go through by hand and find a
15 couple of responsive documents for sure.

16 But the process itself that you went through is not
17 the kind of process that gives me comfort and so it gives me
18 pause. And it doesn't arise like a phoenix out of the ashes,
19 it arises in the context of this case and the way this case
20 has been litigated. And I think about the totality of the
21 circumstances, too. So all of those things is why -- all of
22 those things are reasons why I'm thinking about doing this
23 and have concern.

24 Am I trying to -- they may or may not -- I know you
25 regularly remind me of two things, Mr. Joffe. One, that your

1 clients were in prison. And two, that they're a big, huge
2 Fortune 100, 500, 50, I don't know. They're a big
3 corporation and they're a big, huge law firm in New York with
4 a lot of money and they're trying to bury you. And I
5 consider that, but you know what? You don't get to win
6 motions because your clients were, for seven months, in the
7 Chinese prison. It makes the case serious, but I have to
8 decide each motion on its merits and they do have a lot of
9 money, but they have a budget, too, and they have limitations
10 and restrictions, and so, if they're trying to bury you, I
11 don't want them to be able to bury you. Okay.

12 Don't help them bury you. That would be my advice
13 to you, okay? That's why you should keep your eye on the
14 ball. That's why -- this isn't the first time that I've told
15 you to keep your eye on the ball. And so I'm thinking about
16 that a lot. Am I mindful -- the reason I didn't do what they
17 wanted me to do in June, because you told me that if I
18 ordered your -- a quarter millions dollars in cost to them,
19 that would be the end of your client's case. That doesn't
20 seem to be fair.

21 MR. JOFFE: I can repeat that, yes.

22 THE COURT: So I'm mindful of that, so the fact
23 that your clients aren't as well healed as HP, doesn't excuse
24 them or allow them to do what -- turn over the 775,000 that
25 way. Am I thinking about those issues? I am. You have the

1 ability to try to figure out solutions to these problems and
2 be practical and work with them, too. But in the meantime,
3 at the moment, how much does it cost -- you tell me -- in a
4 week? I understand your position is what you did is
5 sufficient and I shouldn't order anymore. I'm not ordering
6 anymore at the moment, but I do have the feelings and
7 concerns that I've expressed about the spreadsheet and I'm
8 considering the person I appointed -- I'm appointing somebody
9 to do what I described, which is a little bit different, and
10 if I did, I would appoint that person, unless someone had a
11 good reason why I shouldn't appoint that person, or propose
12 somebody else. I'm not wedded to that person. That just
13 seemed like an impressive person I heard speak.

14 And for the record, I've never -- before that
15 conference, met that person, and this is the only
16 communication I've ever had with this person since that
17 conference, and never heard of that firm until today when I
18 looked up where she worked. So --

19 MR. JOFFE: Just one quick, last point on this,
20 Your Honor, if I may. We agree and we admit that producing
21 700 something thousand pages was not the right way to do it.
22 I don't think there was -- or maybe the defendants do -- I
23 don't think they argued that we did it intentionally and I
24 think as we all discussed this several times, this huge
25 universe of documents came because we applied their search

1 terms and we diligently tried to get all --

2 THE COURT: I didn't say you did it intentionally.

3 MR. JOFFE: We did not.

4 THE COURT: I didn't say that, but let me explain
5 one thing. That part of your job, in my view, is to be
6 practical to solve practical problems. You had 775,000
7 documents that were being produced. You had a practical
8 problem. You knew it contained junk e-mail. You knew it
9 wasn't a proper way to respond to discovery. You told
10 them -- what I know is you told them you were producing a lot
11 of documents. As far as I know, you didn't go to them and
12 propose a solution to that, other than give them less
13 documents.

14 You could have come to the Court and said, Judge, I
15 want to solve this problem, I want to have a status
16 conference. I file a motion and say they want to do all
17 these search terms, it's producing this, and before we go do
18 everything and produce all the documents, there's a lot of
19 different ways to solve the problem. You didn't solve the
20 problem. You dumped 775,000 pages on them that you knew
21 wasn't a proper response to discovery. That much I know.

22 Did you do it intentionally in a sense where you're
23 trying to bury them? I didn't conclude that and I'm not
24 saying that, but that's not helpful. That's not the way you
25 keep the eye on the ball and move the case forward, and I'm

1 not necessarily persuaded that the spreadsheet you did is a
2 reasonable and practical solution to the problem. And so
3 that's why I've come up with one possible solution of my own,
4 that's why I'm going to hear what they have to say about how
5 much it costs and I'm going to think about it. And I might
6 invite a telephone conference or some submission from all of
7 you on the issue, if I think that would be helpful, or if I
8 have issues to discuss with you as I think about it. I fully
9 understand that, as I decide what to do, that you think it is
10 sufficient what you've done, and I shouldn't order anything
11 else and that they're trying to bury you in expense. I fully
12 appreciate that that's your view of the discovery process.

13 All right. So that takes care of the issue about
14 plaintiffs' production.

15 So that leaves only the motion to compel. So I
16 will tell you that I'm going to resolve the motion to compel
17 on the merits and that I've gone through the entire motion
18 and the response and request and all that, I'm going to issue
19 a written order addressing each one, one by one. I'm not --
20 I have only really one question that I want to go over with
21 you and have time to go over with you today, which is one of
22 the things that you all spent a lot of time on, I'm not quite
23 sure why, but sometimes it's not for me to reason why, was
24 third-party financing. And so my question about this, why do
25 all of you care so much about it?

1 MR. JOFFE: Why we care so much about it? Because
2 for reasons we mention in our brief, because if they know
3 what we have, how much we have left, that will give them huge
4 strategic advantage. That's all.

5 THE COURT: So I guess -- that way I thought about
6 is this. It didn't occur to me -- I assumed, like I do in
7 every case, that the litigation is being paid in some
8 combination between the plaintiffs who are parties to the
9 litigation and some sort of contingency fee arrangement, if
10 there is one. What I understood the defendants to be asking
11 for is not anything with respect to that universe, but if
12 there's a third party, who's not a party, who -- like -- and
13 not the father -- I assume they're not really care if the
14 father of one of the parties is funding the litigation or
15 something, but I don't know, that it seemed to me a request
16 that was looking for something different, like an investor in
17 the litigation.

18 So you all -- what I will tell you what I infer,
19 because you all care about it, I infer that the defendants
20 have some reason to guess, speculate, or suspect, in fact,
21 there's an investor in the litigation. The fact that one of
22 the -- the biggest single section in our opposition to the
23 discovery motion is with respect to third-party financing and
24 not with respect to each of the individual things that they
25 want, that relate to the merits of the case, made me think

1 that there might well be an investor in this case, or
2 otherwise why spend all that time and money fighting it, why
3 not say there isn't, good bye. And so you don't have to tell
4 me at the moment whether there is or there isn't, but I will
5 tell you that that got me thinking about the issue.

6 I'm not at all persuaded that the defendants are
7 entitled to know about any of that, but I am persuaded that I
8 am entitled to know, because you have made representations to
9 me, number one, about your financial condition and I want to
10 know whether those are truthful or not. I view them very
11 differently, if there is -- if Burford is behind this
12 lawsuit, have you heard of them?

13 MR. JOFFE: Pardon?

14 THE COURT: Have you heard of Burford?

15 MR. JOFFE: Yes, I've heard of it.

16 THE COURT: So if Burford is investing in this --
17 do you all know who Burford is?

18 MR. CALLAGHAN: Not specifically, Your Honor, but I
19 believe I understand where you're going.

20 THE COURT: My understanding of Burford is they're
21 a publically traded, London-based company that invests in
22 lawsuits and they're a billion-dollar company or more. If
23 Burford is behind this case, then it looks differently to me,
24 your representations about your ability to do this. If the
25 third party is somebody, I don't know, is the father of one

1 of the plaintiffs and they put in \$50,000, I don't know why
2 anybody would really care and it doesn't really change
3 anybody. It also bears on --

4 I'm not going to get into it, but I will tell you
5 if you go back to mediation, if I were mediating a case, I
6 would expect the investor to be there, or have a role, just
7 the way I would expect the insurance adjustor in the case,
8 the ones with the company, they have a control in the
9 decision, they need to be there, and at least it should be
10 revealed their existence. I'm not going back to what
11 happened in the mediation that did happen, but if you go back
12 to mediation, if there is.

13 So anyway, I will just tell you about that issue,
14 that I'm not inclined to, at the moment, give it to all of
15 you, but I think there are certain ex parte, in-camera
16 disclosures that might need to be made to me, and I think I'm
17 going to do it in the form of an order to show cause why you
18 shouldn't tell me these things before you do tell me them, to
19 give you a chance to then say whether you think I shouldn't
20 know those things, because I am the presider over the case.

21 And I will tell you that Judge Polster in the
22 opioid litigation in Ohio issued an order to show cause,
23 ordered the people to disclose certain things, I think to him
24 about third-party financing, because it can also bear on your
25 professional obligations. And so where I'm going with this

1 is not -- I'm going to issue an order to show cause, like
2 these are things I think you should tell me, but you don't
3 have to tell me yet. I want you to tell me why you shouldn't
4 have to tell me. And if you agree you should tell me, then
5 fine. Then I'll tell you to tell me. And if you don't
6 agree, you'll have the chance to tell me and I'll consider
7 that before you do tell me.

8 Are we clear?

9 MR. JOFFE: Almost.

10 THE COURT: It will all be in writing.

11 MR. SASO: Your Honor, I guess one question would
12 be whether we would have the opportunity to be heard on that
13 order to show cause, as well?

14 THE COURT: So why -- so the order to show cause,
15 he'll file something, you can file something in response to
16 it, too, if you want. Yes. You can tell me why I should
17 order to show cause -- why I should order more things to be
18 told to me or less things or different things. Or if they
19 say they shouldn't have to tell me, you'll be entitled to
20 tell me why they should have to tell me, for sure. The order
21 to show cause is going to be public and his response to the
22 order to show cause is public, because his response isn't
23 giving me the third-party financing information. It's just
24 telling me why I shouldn't or shouldn't be able to know
25 whatever I'm asking about and you could say I should have to

1 ask about more different things.

2 What I'm contemplating at the end of it is an ex
3 parte filing about those things, but you would be -- you can
4 also say why you should get to know it. I'm just not
5 persuaded why you get to know it.

6 MR. BUNIS: And Your Honor, I think your thought
7 process that you've just articulated here today actually
8 mirrors some of ours during the meet and confer in the
9 discovery process. In all of the cases that we've reviewed
10 on this legal topic, in every case that we could find, the
11 existence and identity of the third-party funding source was
12 disclosed. That was not what was being fought over in any of
13 those cases. Instead, the question was should the fee
14 agreements be produced, should the communications with the
15 third-party funding source be produced.

16 And so when we asked the question, plaintiffs just
17 tell us, because as interesting of a topic as this is, we do
18 not want to focus on that in our motion to compel, if this is
19 just an academic exercise, and we think that it's at least
20 your meet-and-confer obligation, because we can avoid all of
21 the attorneys' fees that are going to go into this, if there
22 is no such third-party funding source. So I think that what
23 I would urge the Court is that when it comes to the existence
24 and identity of a third-party funding source, it is my view
25 that that is almost, per se, not privileged and relevant and

1 responsive here. That it's something that we should know, in
2 particular because the plaintiffs are making a claim for
3 reimbursement.

4 THE COURT: Well, I do think that if the investor
5 is a publically traded company -- if there is an investor in
6 this lawsuit and if the investor is a publically traded
7 company, there's a local rule about corporate disclosures at
8 the beginning of the case.

9 MR. JOFFE: Your Honor, if I may, there is no
10 publically traded investor in this case.

11 THE COURT: Okay. So if there is an investor in
12 this case, non-publically traded, I still think -- and this
13 is part of the order to show cause, you have to tell me who
14 it is, because, for example, suppose that investor is my
15 next-door neighborhood who I'm good friends with, I'm
16 recusing from this case, because it would be improper for me
17 to be the judge in this case, but you're not telling me even
18 that there -- I should even know about that and what if I'm
19 having dinner with my neighbor and he tells me something
20 about the case and then I discover I've been presiding over
21 it. And so there's all sorts of -- there's disclosure
22 issues, there's lots of things, so that's one of the reasons
23 I'm ordering to show cause, to address those things. This is
24 part of like keeping your eye on the ball.

25 And you can solve these problems. This has

1 ballooned into a waste of time, in a complicated, little
2 issue, that -- like if there is nobody, fine, just say that.
3 Sounds like there's somebody, but it's not publically traded.
4 Okay. Fine. But you can spend -- we're going to spend --
5 we've already spilled a lot of money and ink on it, and we're
6 going to spend more, because I'm going to issue the order to
7 show cause and you're going to respond to it and they're
8 going to file something, but there are, you know -- you can
9 choose to fight everything, which is sort of the path that
10 you've gone down, but that seems to me to be a waste of time,
11 and I'm going to be riding this case regularly from now on,
12 because it's taking too long and I don't like the way it's
13 gone.

14 And so like the suggestion is solve these problems,
15 because your clients, who pretty soon I might start ordering
16 to come to these hearings, so that I can explain to them
17 what's going on in this case. It would not be the first time
18 I've done that in a case, understand why they're not yet in
19 front of a jury. But in the meantime, that's how I'm going
20 to handle that. And -- yes?

21 MR. CALLAGHAN: Sorry, Your Honor, to interject,
22 but to the extent that the Court is inclined, we would ask,
23 as well, that there would be reference made to whether or not
24 the individual plaintiffs ab initio were privy to the
25 existence of any such third-party funder, whether the

1 third-party funder is in a position to dictate the outcome or
2 any potential early resolution of the case. And in that
3 regard, Your Honor, I'm referring, in reference to our PC 1.7
4 and the existence of a third party that might --

5 THE COURT: What's RPC?

6 MR. CALLAGHAN: It's to do with the conflicts, Your
7 Honor, the influence of a third party. And while Your Honor
8 is going to be reviewing this stuff in camera and it's going
9 to be ex parte, we would simply urge that if you're
10 comfortable with all of that and you're disinclined to let us
11 see it, we would be happy with that, but we would be
12 concerned that somebody, at least, keep an eye to that ball.

13 THE COURT: Okay. You can also think about in your
14 response whether I should be the one looking at it, or
15 whether if it -- it should be looked at by the magistrate
16 judge in the case, or by a different district judge who's not
17 me, presiding over it, and you can invite that and I'm open
18 to that.

19 Okay. All right. Fine. So I think that takes
20 care of defendants' motion to compel. I don't think I need
21 to hear argument about it, by and large. And I'll resolve --
22 I'm going to issue a written order about all of the other
23 stuff, just briefly, but I wanted to meet with all of you to
24 explain it. So the last thing then is this. So in a week,
25 you're going to give me the status report, and then we'll see

1 where we are about plaintiffs' production. In three weeks,
2 your deadline for filing a motion to compel is three weeks
3 from today. You got to meet and confer before that. You'll
4 talk to him, because he gets the opportunity to file it.
5 He's limited to what's in the letter, that -- what was in
6 July, the deficiency letter. And then we'll get the motion
7 and then if he files it, the motion will comply, because this
8 is the -- we have one time where you read the local rules,
9 when you, before becoming pro hac vice; one time when I
10 reminded you to comply with that ruling when you're filing a
11 discovery motion, which was in June and I specifically
12 reminded all of you to do it.

13 And then you filed it not in compliance, and now I
14 have reminded you again, specifically, and you confirmed for
15 me orally that you understand that rule, that you knew about
16 it before, you've known about it at all times and that you
17 will comply with it. So I'm expecting that the motion will
18 comply with it. And I've told you, unambiguously, that if
19 you don't comply with the format of that rule, I will deny
20 your motion, and that will be the end of your motions to
21 compel on paper discovery.

22 So we'll proceed with that three weeks, you'll have
23 two weeks to respond. If you wish to file a reply, you can
24 file a motion for leave to file a reply. And you can look at
25 my standard order about how I resolve motions that I don't

1 wait -- I don't promise I'll wait for the reply, but
2 obviously if you file a motion, then you can do it.

3 Going forward, once we're -- we've resolved these
4 outstanding issues, which are whatever further discovery I
5 order out of the defendants' motion to compel, whatever there
6 is about plaintiffs, and whatever, if anything, comes out of
7 plaintiffs' motion as distinct from their production. Then
8 we're going to need revise the schedule.

9 So let me just explain to you how I'm thinking
10 about going forward. I'm thinking that we're going to meet
11 regularly. I know how much you all like to see me.

12 So we're going to meet regularly, because I'm going
13 to want to stay on top of this case to move it forward, and
14 if it means that I have to meet with you every week, I'll
15 meet with you every week, and if it means that I can meet
16 with you every month, I'll meet with you every month, okay?

17 And the way -- but I'm going to meet with you
18 regularly to resolve problems fast to keep this case moving,
19 because it's not moving, and because there's been too much
20 disregard of the rules and obstruction. And so we'll see --
21 the purpose of those meetings is to keep the case moving and
22 whatever amount of time it takes for me to devote to this
23 case to make sure that it gets resolved on the issues, it may
24 get resolved on summary judgment, and you may lose. I have
25 no idea, Mr. Joffe, but I'm done with the way it's been going

1 so far.

2 Are we clear?

3 MR. JOFFE: Yes, Your Honor.

4 MR. CALLAGHAN: Yes, Your Honor.

5 THE COURT: Okay. So I think what comes after that
6 paper discovery, the way you proposed going forward, is some
7 depositions?

8 MR. CALLAGHAN: Your Honor, we had made the
9 proposal, and the Court agreed, I think all parties agreed,
10 there would be a summary judgment cycle with regard to
11 whether or not the goods were counterfeit, which would
12 potentially cut the case in half, if successful.

13 THE COURT: Yes.

14 MR. CALLAGHAN: And I think the proposal was that
15 after the resolution of the -- sorry, Mr. Saso, after the
16 resolution of the data dump, and if there would be no further
17 motions to compel.

18 THE COURT: After the paper discovery.

19 MR. CALLAGHAN: Yeah, paper discovery. That,
20 within 30 days, plaintiffs would propound an expert report,
21 and then we would respond in kind and then set up a motion
22 for summary judgment.

23 THE COURT: So you don't -- nobody needs any
24 depositions?

25 MR. CALLAGHAN: We probably need expert

1 depositions. The previous schedule had that incorporated
2 into it.

3 THE COURT: Fine. So you're talking about 90 days
4 for expert deposition, 30 days for the report, 30 days for
5 the response, and 30 days for the depositions?

6 MR. JOFFE: The parties were supposed to exchange
7 the expert reports.

8 MR. CALLAGHAN: We understood that the plaintiffs
9 were --

10 MR. JOFFE: We can go back and look at what was --

11 MR. SASO: I think it would have been the June
12 conference, Your Honor, where I think that after -- you had
13 set a deadline for compliance with the motion to compel.
14 30 days after that deadline, the plaintiffs would serve their
15 expert report, we would have 30 days, and then 30 days for
16 depositions.

17 THE COURT: Okay. Fine. So then the only
18 depositions that you're all anticipating are the experts?

19 MR. SASO: Yes, Your Honor.

20 MR. JOFFE: Prior to --

21 THE COURT: Prior to that summary judgment on that
22 issue, yes.

23 MR. CALLAGHAN: And just to be complete, Your
24 Honor, there was also an issue with regard to the 30(b)(6)
25 deposition, to tee up what we believe would be a spoliation

1 motion, which is unrelated to the summary judgment, but that,
2 too, is being teed up after the paper discovery is being
3 completed.

4 THE COURT: So there would be that 30(b)(6)
5 deposition?

6 MR. CALLAGHAN: Yes.

7 THE COURT: Okay. Fine. So when we're done with
8 the paper discovery, to the extent we need to -- the schedule
9 runs off when we're done, but we'll have to -- we're going to
10 have to decide together what day it's done, because I'm not
11 going to have litigation over that. And then we'll review
12 that 30, 30, and 30, for those three steps seems reasonable
13 and I don't see any reason to change that, but I'm going to
14 want to keep this case moving and we'll talk about the pace
15 for the summary judgment process and I'm going to resolve the
16 summary judgment not -- it's not going to be seven months for
17 you to get the summary judgment decision for me. And then
18 we'll see where we are and we'll go from there.

19 So there isn't going to be any discovery -- and I
20 think the other thing we're going to talk about is what other
21 discovery is to come, because whether we need to do
22 simultaneous or keep it moving or not, or what we're doing.
23 So I want to think about all that. All right. Okay. Thank
24 you very much. Have a good day.

25 MR. JOFFE: Thank you, Your Honor.

1 THE DEPUTY CLERK: This matter is adjourned.

2 (Court in recess at 3:14 p.m.)

3
4 **CERTIFICATE OF OFFICIAL REPORTER**

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7 I, Rachel M. Lopez, Certified Realtime Reporter, in
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